

1 McPHAIL

2 you could tell us?

3 A. Well, in the back, where we have a
4 lunch break. You know, there's a little room
5 in the back where we could take a break and
6 they had a little TV in the back there too and
7 the lockers were there.

8 Q. And --

9 A. Outside of the restrooms. There
10 two restrooms inside there, Terminal B.

11 Q. Is it a place that could be
12 accessed by the public?

13 A. No.

14 Q. So, is it a restricted area for
15 those not authorized to go there?

16 A. Right, it's restricted.

17 Q. Since you worked there on weekends,
18 did you ever see any customs officer coming
19 there during the weekend to take things from
20 their lockers?

21 A. No.

22 Q. You never saw that?

23 A. I never saw anyone even open those
24 lockers?

25 Q. To your knowledge, do Customs and

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2 Border Protection officers profile Nigerians at
3 Newark International Airport?

4 MR. CLOPPER: Objection.

5 That question calls for information
6 covered by the law enforcement privilege
7 and I'm going to instruct the witness
8 not to answer.

9 Q. Do you recall being questioned by
10 an EEO officer in connection with
11 Ms. Akinyemi's complaint?

12 A. Yes.

13 Q. Do you recall providing an unsworn
14 statement to the person who questioned you?

15 A. Excuse me?

16 Q. Do you recall providing a statement
17 to the person who questioned you?

18 A. Over the phone.

19 Q. Did you ever have occasion to
20 review the statement which you provided?

21 A. Yes.

22 Q. Did you ever sign any statement,
23 unsworn statement, that you provided?

24 A. I signed at the bottom copy, I
25 think so.

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2 Q. Okay, before you signed, did you
3 read the questions and answers on the document
4 that you signed?

5 A. Yes.

6 MR. OKOLI: I would like to have
7 marked for identification for today's
8 deposition a three-page document, I
9 believe Bate numbered 73 to 75.

10 (Whereupon, the aforementioned Copy
11 of Unsworn Declaration of Brendan L.
12 McPhail, Three Pages was marked as
13 Plaintiff's Exhibit 1 for identification
14 as of this date by the Reporter.)

15 Q. I'm placing before you what is
16 marked Plaintiff's Exhibit 1 for identification
17 at this deposition (handing), I will ask you to
18 review the document and tell me if you
19 recognize what it is.

20 A. (Witness perusing document.)

21 Q. What do you recognize it to be?

22 A. These are the questions she asked
23 me over the phone.

24 Q. Is it your initials on the first
25 page of the document; is that your initials?

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2 A. That's correct.

3 Q. And did you make the correction
4 "Customs and Border Protection officer" on that
5 first page, is that your handwriting -- at the
6 bottom of it, something is written in hand,
7 something is crossed out --

8 A. You know, I don't know where that
9 came from. I didn't do it.

10 It looks like my writing, though,
11 but I don't remember doing that. It looks like
12 my writing.

13 Q. Now, on the second page, do you
14 have your initials as well?

15 A. Yes (indicating).

16 Q. And on the last page, is that your
17 signature?

18 A. Yes (indicating).

19 Q. Okay, thank you.

20 MR. OKOLI: I would like us to call
21 the judge on this.

22 MR. CLOPPER: Okay, I'm sorry, on
23 what; on my objections?

24 MR. OKOLI: Yes.

25 MR. CLOPPER: Well, let's take a

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2 break and see if we can talk about it
3 for a moment. Let me speak with my
4 co-counsel and we will come back to it.

5 MR. OKOLI: Okay.

6 MR. CLOPPER: Off the record.

7 (Whereupon, an off-the-record
8 discussion was held.)

9 MR. CLOPPER: Could we read back
10 the last pending question, the question
11 that was objected to.

12 (Whereupon, the referred to
13 question was read back by the Reporter.)

14 MR. CLOPPER: I objected to that
15 question, and I continue to object to
16 that question.

17 And then Mr. Okoli, you raised the
18 issue of Officer McPhail's declaration
19 here, I will allow you to ask him a
20 question about what he meant by his
21 statements in his declaration, you
22 wanted to do that.

23 MR. OKOLI: No, that's not what I
24 wanted.

25 I wanted an answer to my question.

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2 If you are still objecting, then we need
3 to call the judge. If you want to
4 withdraw your objection, then you are
5 entitled to do so, but if you are
6 insisting on your objection, then I want
7 a judge's ruling on the objection.

8 MR. CLOPPER: Let me think about
9 this. Give me a minute.

10 Let's go off the record.

11 (Whereupon, an off-the-record
12 discussion was held.)

13 MR. CLOPPER: Let's go back on the
14 record.

15 I'm going to allow the witness to
16 answer this question, subject to what he
17 personally knows about.

18 And I would direct the witness in
19 his answer not to reveal any
20 investigative techniques or other
21 sensitive law enforcement information.

22 Other than that, I will allow him
23 to answer the question.

24 MR. OKOLI: Could you read back the
25 question to the witness.

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2 (Whereupon, the referred to
3 question was read back by the Reporter.)

4 A. And what did I say in that?

5 Q. It's not what you said here, it's
6 the question that you have been asked.

7 A. Well, assuming -- I would assume
8 they profile. But I have no knowledge of that.
9 I am not in targeting. I never was into
10 targeting. I would just assume they would
11 profile.

12 Q. What is your basis for your
13 assumption?

14 A. Well, being Nigeria is a source
15 country.

16 Q. When you say --

17 A. There's drugs coming out of the
18 Nigeria.

19 Q. So, your assumption is based solely
20 on the fact that drugs come out Nigeria?

21 A. From the country.

22 MR. CLOPPER: Objection.

23 It mischaracterizes the witness's
24 testimony.

25 Q. Is there anything else that you

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2 base your assumption on?

3 A. No.

4 Q. As a CBP officer, have you
5 participated in the profiling of Nigerian
6 passengers?

7 MR. CLOPPER: Objection.

8 A. No.

9 Q. I am placing back before you in
10 Plaintiff's Exhibit 1 (handing).

11 In your answer at 074, when you
12 say, "We profile Nigerians," just that
13 statement, "We profile Nigerians," what do you
14 mean?

15 MR. CLOPPER: Objection.

16 As I said before, I'm going to
17 allow the witness to answer the
18 question, to the extent he has personal
19 knowledge.

20 I would caution the witness --

21 MR. OKOLI: No, you can't make a
22 speaking objection, please. You can't.

23 I mean, if you want, we can call
24 the judge.

25 I'm asking a very clear question.

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2 He reviewed the document and he
3 signed it, he corrected something, he
4 didn't strike that, and that's what I'm
5 following up on.

6 So, if you are going to make a
7 speaking objection, we are going to call
8 the judge.

9 MR. CLOPPER: I am not making a
10 speaking objection. I am simply
11 cautioning the witness not to reveal any
12 law enforcement privileged information.

13 MR. OKOLI: Shall we just call the
14 judge.

15 MR. CLOPPER: I will allow him to
16 answer.

17 MR. OKOLI: We will go head.

18 Q. What do you mean when you say, "We
19 profile Nigerians"?

20 A. I don't remember saying that, sir,
21 that we...

22 Q. Is that your initial at the bottom
23 of the --

24 A. Okay, okay. Let me see.

25 Okay, well, maybe I shouldn't have

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2 said that, because I have no knowledge of how
3 to target, I never worked in a targeting unit.

4 I'm just assuming. It's all an
5 assumption on my part when the question was
6 asked to me over the phone.

7 Q. But after the question as was posed
8 to you over the phone, you had an opportunity
9 to review --

10 A. Yes.

11 Q. -- this document before you signed
12 it?

13 A. Right.

14 Q. And you also had an opportunity to
15 correct what may have been incorrect?

16 A. Okay.

17 Q. And you, in fact, did correct
18 something on page one?

19 A. Well, that, I don't remember
20 correcting, but it looks like my handwriting.

21 Q. Very well.

22 A. Okay.

23 Q. So, here, in your answer, you did
24 not say you were assuming, correct; in your
25 answer to question --

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2 A. Yes, but, sir, I have no knowledge
3 of who they target. I don't work in the
4 targeting unit.

5 Q. Now --

6 Are you done with your answer?

7 A. Yes.

8 Q. Okay.

9 So, again, to come back to the
10 point, what is the basis for your assumption
11 that Nigerians are profiled?

12 A. Because --

13 MR. CLOPPER: Objection.

14 Asked and answered.

15 Sorry about that, you can go ahead
16 and answer, to the best of your ability.

17 A. Because it's a source country.

18 Q. And when you say, "it's a source
19 country," what does that mean?

20 A. For drugs.

21 Q. What does that mean?

22 A. Well, drugs come from Nigeria.

23 Q. Okay.

24 So, do you assume that because
25 drugs come from Nigeria, every Nigerian is

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2 connected in the drug trade?

3 A. Not at all.

4 MR. CLOPPER: Objection.

5 Q. Sorry?

6 A. No, I don't think that at all.

7 Q. You do not know whether
8 Ms. Akinyemi's husband was profiled?

9 A. No, I have no idea.

10 Q. On the occasions that you worked at
11 the airport, did you ever overhear any
12 conversation by any customs officer concerning
13 Nigerians and drug smuggling?

14 MR. CLOPPER: Objection.

15 That question calls for information
16 covered by the law enforcement privilege
17 and I'm instructing the witness not to
18 answer.

19 MR. OKOLI: Shall we call the
20 judge, please.

21 MR. CLOPPER: Sure.

22 MR. OKOLI: Get the phone and then
23 we will call the judge.

24 MR. CLOPPER: Before we do, could
25 you read back the question for me.

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2 (Whereupon, the referred to
3 question was read back by the Reporter.)

4 MR. CLOPPER: Actually, I'm going
5 to allow the witness to answer this
6 question.

7 A. Can you repeat it?

8 MR. OKOLI: Can you read back the
9 question, please.

10 (Whereupon, the referred to
11 question was read back by the Reporter.)

12 A. No.

13 Q. How did you learn that Nigeria was
14 a source country?

15 MR. CLOPPER: Objection.

16 This answer calls for information
17 covered by the law enforcement privilege
18 and I'm instructing the witness not to
19 answer.

20 And I apologize, Mr. Okoli, for
21 going back and forth.

22 MR. OKOLI: That's okay.

23 MR. CLOPPER: On this one, I will
24 instruct the witness not to answer.

25 If I could have this question

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2 repeated back to me.

3 (Whereupon, the referred to
4 question was read back by the Reporter.)

5 MR. CLOPPER: Let's just go off the
6 record for a moment, in order to call
7 the judge.

8 (Whereupon, an off-the-record
9 discussion was held.)

10 JUSTICE PECK: This is Judge Peck.

11 MR. OKOLI: Good morning, Judge.
12 This is K.C. Okoli.

13 John, do you want to introduce
14 yourself.

15 MR. CLOPPER: And this is John
16 Clopper, Assistant United States
17 Attorney.

18 JUSTICE PECK: All right, and I
19 understand that you have got a court
20 reporter taking this down.

21 MR. OKOLI: Yes, Your Honor.

22 JUSTICE PECK: First, why don't you
23 fill me in on what happened last week,
24 when I was out of town.

25 I know that Judge Eaton ruled on